

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|------------------------|---|---------|
| MARY BETH HARSHBARGER, |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| vs |) | 09cv487 |
| |) | |
| |) | |
| MICHAEL REGAN, et.al., |) | |
| |) | |
| Defendants |) | |

BEFORE: HONORABLE THOMAS I. VANASKIE
United States District Judge
for the Middle District of Pennsylvania

Telephone Conference
Re: Habeas Corpus Petition

Tuesday, March 17, 2009
Scranton, Pennsylvania

A P P E A R A N C E S:

For The Plaintiff: PAUL P. ACKOUREY, ESQ.
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KRISTIN L. YEAGER, RMR,CRR - COMPUTER TRANSCRIPT

1 (The following took place by way of teleconference.)

2 THE COURT: Hello.

3 MR. ACKOUREY: Hello, Judge.

4 THE COURT: Yes, this is Judge Vanaskie.

5 MR. FISANICK: Hi, Your Honor, Chris Fisanick.

6 MR. ACKOUREY: And Paul Ackourey, Judge.

7 THE COURT: Good morning. Thanks for being available on
8 short notice.

9 I've been assigned this Habeas Corpus Petition in the
10 Harshbarger matter, and I think, probably, you all know or
11 should know that I had presided over a civil litigation that
12 involved Mrs. Harshbarger, in connection with distribution of
13 life insurance proceeds. I don't think that poses any problem,
14 but I just wanted you both to be aware of it. And I do have a
15 court reporter here and a record, of course, of the conference
16 is being made.

17 Now, I needed to find out -- I know that Magistrate Judge
18 Mannion has directed that she surrender on the 20th of March,
19 which is this coming Friday. I need to find out, What's my
20 scope of review here? Am I limited to the record that has been
21 presented to Judge Mannion, and if so, what is the need to have
22 this decided by the 20th, from the Government's perspective, I
23 take it? And those are a couple of questions I have right now.

24 So maybe we start with the scope of review. First, is my
25 review limited to the record compiled by the Magistrate Judge?

1 MR. FISANICK: Your Honor, it's the Government's position
2 that your review is extremely limited in this case, and we have
3 filed, in a previous pleading with Magistrate Judge Mannion,
4 that that, basically, is the review. It's not a plenary review
5 or not a de novo review. You basically, as I see it, there are
6 only three things you can review, and the only one I think that
7 would be in dispute, really, would be the probable cause
8 determination of Magistrate Judge Mannion.

9 THE COURT: All right. Do you agree, Paul?

10 MR. ACKOUREY: Judge, in response, I believe that your
11 review is limited to what has already -- in terms of a factual
12 basis -- is limited to what has been presented, so to that
13 extent, I would agree. I think the crux here is the probable
14 cause determination. I think we have it framed somewhat
15 differently in our habeas, in that, I believe there is also an
16 equal protection issue raised.

17 But it's also -- I think it goes to the issue of -- to the
18 probable cause issue.

19 THE COURT: All right.

20 MR. FISANICK: Just in rebuttal to that, I would point out,
21 Your Honor, that the U.S. Constitution doesn't apply to an
22 extradition proceeding, such as the Confrontation Clause, the
23 Due Process Clause or Equal Protection Clause, so it pretty
24 much is limited to the probable cause determination. Any of
25 these other issues are not promptly before the Court.

1 THE COURT: Paul, your Equal Protection argument, is that
2 based on the fact that Judge Jones reached a decision in the
3 Sylvester matter that may be different than the decision
4 reached by Judge Mannion in this case?

5 MR. ACKOUREY: Well, it was more than just that he reached a
6 different decision, Judge, the application of the law was
7 different. He read Section 10, Paragraph 1 of the Treaty to
8 require the application of Pennsylvania law in determining the
9 issue of probable cause, namely, in Pennsylvania, probable
10 cause is determined -- cannot be based solely on hearsay, and
11 he ruled that the evidence, which was solely hearsay, was
12 insufficient to establish probable cause as a matter of law.

13 Judge Mannion has rejected that view. I think there's an
14 issue as to whether or not Judge Jones' determination is, in
15 fact, binding, as it relates to the Magistrate's review, but
16 nonetheless, we are beyond that at this stage. So to that
17 extent, I mean, there's a real question here as to what law
18 applies.

19 MR. FISANICK: Federal law applies, Your Honor, and as
20 Magistrate Judge Mannion pointed out in his opinions, the case
21 laws are legion that an extradition proceeding can be based
22 solely on the paper, and it's not subject to the idiosyncratic
23 procedural laws of the jurisdiction, such as Pennsylvania.
24 There's U.S. Supreme Court precedent that suggests that the
25 Government does not have to call four constables into the

1 United States, in fact, that would actually be in derogation of
2 the rights and privileges established under the Treaty, in
3 that, we are not disrupting a foreign police department's
4 process by bringing them to the United States to testify.

5 THE COURT: Is there any distinction to be made on the basis
6 of the source of the substantive law -- the substantive
7 criminal law, in terms of dual criminality? In other words,
8 does it matter whether -- in Judge Jones' case, he was looking
9 at State law.

10 MR. FISANICK: Exactly, Your Honor, it does, in what
11 Magistrate Judge Mannion has looked on. The one charge, he
12 granted extradition on, he looked at Federal
13 procedural -- Federal law, Federal substantive law, and I would
14 submit to you that the Sylvester opinion by Judge Jones is
15 completely distinguishable, because it has no regard to a
16 Federal statute as being the cognate offense for dual
17 criminality.

18 MR. ACKOUREY: Judge, looking at Sylvester, the decision in
19 Sylvester, I believe kidnapping and rape were the offenses that
20 were the subject offenses in Canada. I don't know that it's so
21 clear from Judge Jones' opinion what the -- I'm just -- based
22 upon my reading of the decision, it's not clear what the
23 corresponding offense he was relying on, but it's clear that he
24 does an analysis of Section 10.1 in determining that
25 Pennsylvania law applies as to the issue of what constitutes

1 competent evidence.

2 THE COURT: Right. Of course, he also found that the Statute
3 of Limitations, at least, the Pennsylvania Statute of
4 Limitations had expired.

5 MR. FISANICK: And Magistrate Judge Mannion, Your Honor,
6 found the same thing for the second of the two charges
7 requested in this case, that is, in fact, he did actually apply
8 Sylvester and did no disservice to Sylvester, recognizing that
9 that was Judge Jones' interpretation.

10 Now, admittedly, Sylvester was not appealed to the Third
11 Circuit and, clearly, the Government has a different view as to
12 the correctness of Sylvester, but leaving that aside, because I
13 don't think we need to face that issue, Magistrate Judge
14 Mannion has ordered extradition on just one charge, finding
15 that a Federal law was a cognate, meaning, that Federal
16 procedure -- Federal procedure, if it applies in some small
17 part does apply and the Statute of Limitations had not run, and
18 that a Federal charge may be proven completely by hearsay
19 according to what the U.S. Supreme Court has said in
20 extradition hearings.

21 THE COURT: Paul, I take it you don't dispute the fact that
22 Federal law does have a comparable criminal statute?

23 MR. ACKOUREY: I don't dispute the fact that the comparable
24 statute was the involuntary manslaughter, we haven't disputed
25 that, however, I think there is a position to be made and a

1 case to be made, and it's been put in our motion that, as
2 applied here, there's some concern about whether Ms.
3 Harshbarger could have known that her actions would have led to
4 criminal conduct.

5 MR. FISANICK: The problem, Your Honor, with that argument
6 is that's an argument based on the U.S. Constitution and an
7 argument, perhaps, raising an affirmative defense in the
8 requesting jurisdiction, which that's not what we are here to
9 decide, that's up to Canada, and if she feels that that statute
10 is vague as applied to the facts of her case, that's something
11 she would have to raise in a Canadian Court.

12 THE COURT: Do I have the record before Judge Mannion?

13 MR. FISANICK: There's a transcript.

14 MR. ACKOUREY: There's a transcript, Judge.

15 THE COURT: I take it there were affidavits presented or
16 what was presented in terms --

17 MR. FISANICK: Your Honor, the Government's presentation was
18 based upon the diplomatic filings, as certified by the State
19 Department from the Department of State of Canada. So in other
20 words, the hearing, basically, consisted of the Government's
21 introduction of all the diplomatic papers, because nothing else
22 really was in dispute. The jurisdiction of Magistrate Judge
23 Mannion was not in dispute, the jurisdiction of the Defendant
24 in this District was not in dispute, the identity of the
25 Defendant was not in dispute, actually, the dual criminality

1 was not really in dispute, what was in dispute was really the
2 determination of the probable cause.

3 THE COURT: Yes, and it really is just a question of
4 whether, as Paul says, you can rely on hearsay. I guess I want
5 to look at the diplomatic file to see what is included in it.

6 MR. FISANICK: It has affidavits of, Your Honor, like,
7 investigator, case agent, witness, and it is filed with the
8 Court, so that is available.

9 THE COURT: In looking over Judge Mannion's decision, I saw
10 that he referred to documents that would have included
11 statements of Mrs. Harshbarger, herself, in terms of how the
12 matter happened.

13 MR. FISANICK: Um-hum.

14 MR. ACKOUREY: I believe that was included in an affidavit.

15 MR. FISANICK: Yes, it was, Your Honor.

16 THE COURT: Okay. All right, well, are both of you available
17 on Thursday of this week?

18 MR. ACKOUREY: Judge, unfortunately, I have received notice
19 that I have a case proceeding to trial in Luzerne County
20 Thursday morning.

21 THE COURT: How about late tomorrow? I'm not available until
22 late tomorrow.

23 MR. ACKOUREY: Late tomorrow is fine, Judge.

24 MR. FISANICK: What are you anticipating, Your Honor?

25 THE COURT: When I say late, I'm going to have to get a

1 court reporter, I'm talking about 5:30, 6:00.

2 MR. FISANICK: Sure.

3 MR. ACKOUREY: For an argument?

4 THE COURT: Yes, for an argument. That will give me sometime
5 to look at the record here. Because I take it -- unless the
6 Government is willing to extend her surrender date, I need to
7 make a decision.

8 MR. FISANICK: Your Honor, you have to understand, too, and
9 Paul knows this and Magistrate Judge Mannion certainly knows
10 this, that my hands are kind of bound in some small part by the
11 Office of International Affairs in D.C. who are kind of
12 directing me on what I need to do on this, and I'm not in a
13 position to concur in an extension of the surrender date.

14 MR. ACKOUREY: Judge, I mean, the cases are replete, though,
15 with Courts granting stays of the surrender date or stays of
16 the certification of extradition, and even conducting or
17 setting bail. I mean, certainly, the Court has the authority to
18 do that. It has been requested in the motion itself.

19 MR. FISANICK: I understand that. Again, I can say without
20 speaking with OIA today that I understand the cases pending the
21 disposition of a habeas corpus almost unanimously grant a stay,
22 because, obviously, the point would be moot, but what my point
23 is, I would not concur in a stay of the turn-in date. We could
24 hold off the extradition until His Honor reviews it and decides
25 the habeas, but the turn-in date, there is a certificate of

1 extraditability issued here, Judge Mannion has basically
2 ordered her to turn herself in, and we can't concur in anything
3 other than that.

4 MR. ACKOUREY: Judge, just in response, and I appreciate
5 that, however, I mean, in all fairness, this case is over two
6 years old, my client hasn't fled anywhere, I mean, the Court
7 certainly could set bail. She's a mother of two children, she
8 lives in Meshoppen, I don't think she's a flight risk, she has
9 appeared for every Court proceeding up to this point in time.

10 MR. FISANICK: I agree with that, I understand that. But as
11 I said, I, unfortunately, am bound by what my superiors in D.C.
12 are basically allowing me to argue on this.

13 MR. ACKOUREY: I understand.

14 MR. FISANICK: I have to argue that, while I may agree in a
15 stay of the extradition itself until we work out the legal
16 matters, I'm not in a position to concur in a stay of the
17 turn-in date.

18 MR. ACKOUREY: I understand that. But certainly the
19 Court -- and it certainly would not be cutting new law here if
20 the Court were to stay both.

21 THE COURT: Are you saying stay the turn-in date, the
22 surrender date and extradition, obviously?

23 MR. ACKOUREY: Yes, Your Honor.

24 THE COURT: Well, I'm inclined to do that. I don't want to
25 offend diplomatic sensitivities, but it's putting me in a

1 difficult position. It looks like Magistrate Judge Mannion has
2 done a very thorough job on this matter, but I just got it
3 yesterday.

4 MR. ACKOUREY: I understand.

5 MR. FISANICK: I understand, Judge.

6 THE COURT: And late yesterday, at that. I have a commitment
7 tomorrow to be down -- to guest lecture at the Dickinson Law
8 School, and then I have our first day of our new Court Assisted
9 Re-Entry Program from 3 until about 6. Frankly, it would be
10 extremely difficult for me to get through this matter to be
11 prepared the way I would like to be prepared to render a
12 decision in the matter extremely promptly.

13 How long is your trial going to last, Paul?

14 MR. ACKOUREY: Judge, I would imagine that I'll be done
15 mid-Friday.

16 THE COURT: All right. Well, here's what I'm going to do.
17 I'm going to issue a stay of extradition and a stay of the
18 surrender date. I'm going to move that back to Friday, March
19 27th.

20 MR. FISANICK: That's fair.

21 THE COURT: How are both of you set for Monday?

22 MR. FISANICK: Let me look at my calendar.

23 THE COURT: Monday, March 23.

24 MR. ACKOUREY: Judge, I seem to be the problem. I have a
25 trial in Bradford County starting Monday morning. It's a

1 one-day trial.

2 MR. FISANICK: Monday looks okay with me.

3 THE COURT: All right, how about Tuesday.

4 MR. ACKOUREY: Fine.

5 MR. FISANICK: Tuesday is not okay, I have to be in D.C. on
6 Tuesday.

7 THE COURT: Okay. What does Wednesday look like?

8 MR. FISANICK: Wednesday looks fine.

9 MR. ACKOUREY: Wednesday is fine with me, too, Judge.

10 THE COURT: All right. Well, it will be the same kind of
11 timing, then, Wednesday, March 25th. It may be, and I just want
12 to give you fair warning on this, Paul, that I'm sufficiently
13 convinced, given what I believe will be a narrow standard of
14 review on my part, I would like to confirm that.

15 MR. ACKOUREY: It is.

16 THE COURT: That I may, in fact, rule from the bench after
17 the conclusion of argument.

18 MR. ACKOUREY: I understand.

19 MR. FISANICK: Okay.

20 THE COURT: So I don't want anybody to have the impression
21 that it's likely that there's going to be a continuation of
22 stay -- it may be, it may be, certainly, if I cannot make a
23 decision then, but if I can, I just want Mrs. Harshbarger to
24 know that, all right?

25 MR. ACKOUREY: I understand that, Judge.

1 MR. FISANICK: Okay, Your Honor, what time are we looking at
2 on the 25th?

3 THE COURT: What I would like to suggest on the 25th is 11
4 a.m.

5 MR. FISANICK: Okay.

6 MR. ACKOUREY: Very good.

7 THE COURT: Okay.

8 MR. ACKOUREY: Thank you, Judge.

9 THE COURT: Thank you. We will issue an Order that stays
10 extradition and stays her surrender date until the 27th of
11 March.

12 MR. ACKOUREY: Very good. Thank you, Your Honor.

13 MR. FISANICK: Thank you.

14 THE COURT: Thank you.

15 (At this time the proceedings were adjourned.)
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C E R T I F I C A T E

I, KRISTIN L. YEAGER, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

S/Kristin L. Yeager
KRISTIN L. YEAGER, RMR,CRR
Official Court Reporter

REPORTED BY:

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